Supreme Court, U.S.
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Nos. 03-535 & 03-541

IN THE

Supreme Court of the United States

INDU CRAFT, INC.,

Petitioner,

-and-

TRENDI SPORTSWEAR, INC.,

Petitioner,

v.

BANK OF BARODA,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Bank of Baroda is incorporated in the Republic of India and 66.26% of its shares are owned by the Government of India. No public company owns 10% or more of its shares.

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Respondent Bank of Baroda (the "Bank") submits this brief in opposition to the petitions of Indu Craft, Inc. ("Indu Craft") and Trendi Sportswear, Inc. ("Trendi") for writs of certiorari to review a Summary Order of the United States Court of Appeals for the Second Circuit which unanimously affirmed the dismissal of Indu Craft's fourth party action for indemnification, and Trendi's "Second Third Party Complaint." Pet. App. at 1a-6a.

Contrary to the assertions of Indu Craft and Trendi, the decisions of the Court of Appeals and the United States District Court for the Southern District of New York are not in conflict with the decisions of this Court, or of any other circuit, raise no novel or important federal question, and provide no compelling reason for review by this Court. Rather, the determinations of the courts below are based upon garden variety common law principles which preclude a claim for indemnification in the absence of a loss, and the settled and salutary rule that precludes the amendment of a pleading long after the expiration of the statute of limitations and the entry of judgment on the underlying claims. Pet. App. at 7a-17a, 18a-36a. Such decisions are undoubtedly correct and should not be disturbed.

COUNTER-STATEMENT OF THE CASE

A. The 1987 Action

The tortured history of this fifteen year-old litigation is detailed in the Summary Order of the Court of Appeals and the Opinions of the District Court dated August 7, 2002 and January 17, 2002 (Hon. John S. Martin), and need not be repeated here. Pet. App. at 1a-6a, 7a-10a, 19a-23a. Suffice it to say that this action is an outgrowth of a 1987 action entitled *Indu Craft, Inc. v. Bank of Baroda*, (87 Civ. 7379 (KTD)) (the "1987 Action") in which Indu Craft asserted various contract

and tort-based claims against the Bank. The case was tried in 1992, and resulted in a verdict in favor of Indu Craft that was ultimately paid in full by the Bank's deposit of the amount of the judgment in an interpleader action.[1] Pet. App. at 20a-21a; Resp. App. at 13a-14a.

B. The 1989 Action

In September 1989, Bank of India ("BOI") commenced an action against Trendi entitled *Bank of India v. Trendi Sportswear, Inc.* (89 Civ. 5996 (JSM)) (the "1989 Action") seeking payment on a promissory note.[2] In May 1990, Trendi filed a third-party action for common law indemnification against Indu Craft, its sister company, claiming that the breach by Indu Craft of a contract to supply goods caused Trendi to default in its obligations to BOI. Rather than move to dismiss Trendi's third-party action as not dependent upon the main claim filed by BOI,

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[1] Like many of the argumentative and unsupported statements contained in the petitions, Indu Craft's assertion that the Bank's interpleader action was "contrived" and somehow "caused Indu Craft to file a Chapter 11 petition for bankruptcy relief" is flatly contradicted by the record. (Indu Craft Br. at 4) As stated by Indu Craft in its Disclosure Statement in support of its proposed Second Amended Plan of Reorganization, "The proximate cause of the decision to seek chapter 11 relief was **the Debtor's inability to consummate a settlement with the IRS**." (Emphasis added) Resp. App. at 14a.

[2] On January 29, 1991, the District Court granted BOI's motion for summary judgment, and on April 24, 1991 a judgment was entered in favor of BOI and against Trendi in the sum of $2,224,895.19. *See Bank of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 433 (2d Cir. 2000). By the time that Indu Craft consented to judgment in favor of Trendi in accordance with the terms of its Plan for Reorganization, the amount of Trendi's third-party claims against Indu Craft had mushroomed to $21,101,348.47. Pet. App. at 21a-22a.

and thus in violation of Fed. R. Civ. P. 14 (Pet. App. at 23a-24a), Indu Craft filed a fourth-party action against the Bank, seeking common law indemnification in the event that it was found liable to Trendi.[3] Pet. App. at 21a.

C. The Indu Craft Bankruptcy

On July 25, 1997, Indu Craft filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York in a proceeding entitled *In re Indu Craft, Inc.* (Bk. No. 97-44958 (JHG)) (the "Bankruptcy Action"). In its Plan of Reorganization (the "Plan"), Indu Craft proposed "payment in full" of all administrative, tax, priority and secured claims from the proceeds of the interpleader action commenced by the Bank, by which the Bank satisfied the judgment entered in the 1987 Action. Resp. App. at 3a. The Plan also contemplated

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[3] In a prior opinion in the 1989 Action, Judge Martin observed that the third-party claims previously asserted by Trendi against Indu Craft appeared to be "manufactured" and were nothing more than the "right pocket" suing the "left pocket." Resp. App. at 23a. That observation that was joined in by Judge Duffy in a prior opinion in the 1987 Action. *See Indu Craft, Inc. v. Bank of Baroda*, 87 Civ. 7379, 1991 WL 107438, at *5, n.2 (S.D.N.Y. June 11, 1991). A similar concern was raised by the Bankruptcy Judge in Indu Craft's subsequent bankruptcy proceeding, in which the Court stated,

> There are lots of things on this plan that are beginning to make me very, very nervous, the way the claims are, the insider problems. This may be a case that would well be served by either a Chapter 11 or Chapter 7 Trustee. If it goes through or not, I think the moment may come to have someone else take a look at this arrangement as it unravels before my eyes.

Resp. App. at 27a.

that the Class 5 subordinated creditors, including Trendi, would also share "pro rata" in the "distribution of the net proceeds of any recovery" in the fourth-party indemnity action ["Baroda II"] commenced by Indu Craft against the Bank.[4] Resp. App. at 8a-9a, 17a.

As detailed in the Plan, the possibility of any recovery by Trendi and the other holders of Class 5 Subordinated Claims was both speculative and remote. Thus, and as stated by Indu Craft in its description of the "Risk Factors" applicable to the Plan, "[t]here can be **no assurance** that the Debtor will recommence the litigation in Baroda II, **or that such litigation**, if commenced **would be resolved in the Debtor's favor**." (Emphasis added) Resp. App. at 17a-18a. Nevertheless, Indu Craft concluded that the Plan was "feasible" and in the best interests of all of its creditors, and recommended its approval.[5] Resp. App. at 2a, 18a, 22a.

As explained by Indu Craft in its disclosure statement, as of the "Effective Date" of the Plan, Indu Craft would be "discharged . . . from all Claims against and Interests in the Debtor" arising prior thereto. Resp. App. at 19a. Both the Plan and the disclosure statements further provided that all persons

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[4] Indu Craft had "ceased operations in November 1987," and the interpleader proceeds constituted its only asset. Resp. App. at 11a.

[5] In explaining why the Plan was "feasible," Indu Craft stated that "it must be demonstrated that consummation of the Plan in not likely to be followed by the liquidation or the need for further financial reorganization of the Debtor." Resp. App. at 18a. Indu Craft concluded that the Plan was "feasible" because it provided for distribution to holders of all "allowed" and "priority" claims from the "Interpleader Proceeds," and because Indu Craft "believes it will be able to make all payments required to be made pursuant to the Plan." Resp. App. at 18a.

or entities having such claims would be "precluded and enjoined" from asserting any such claims "against the Debtor and its successors, assets or properties." Resp. App. at 19a. Finally, all creditors were on notice that the Plan would constitute a "settlement and release" between and among Indu Craft and each of its creditors. Resp. App. at 21a.

On March 24, 1999, Indu Craft filed its Second Amended Plan of Reorganization, As Modified, which was ultimately adopted by Indu Craft's creditors and approved by the Court. Pet. App. at 85a-89a. The treatment of Trendi's unsecured claim was set forth in Article 5, Section 5.2 of the Plan which provided, in the preamble, that "Allowed Claims in Classes 4 and 5 are impaired and shall receive the following treatment under the Plan **in full settlement, release and discharge** thereof." (Emphasis added) Pet. App. at 64a. Under the Plan, Trendi and ANZ Sales, Inc. ("ANZ") were to share in the sum of $200,000, to be paid upon confirmation of the Plan, and Trendi, ANZ and Hemant Mehta, as the holders of claims in Class 5, were to share pro rata in the "net proceeds of any recovery" in the fourth-party indemnity action, after deduction of certain funding costs. Pet. App. at 87a-88a.

Article 9 of the Plan, entitled "**DISCHARGE AND RELEASES**," provided that on the "Effective Date," Indu Craft "**shall be discharged** . . . from all Claims against and Interests in Debtor" arising prior to the Effective Date, whether or not the holder of such a claim or interest had filed a proof of claim or had accepted the Plan. (Emphasis added) Pet. App. at 76a-77a. Section 9.1 (b) of the Plan further provided that "all Persons **shall be precluded and enjoined**" from asserting any claim against the Debtor. (Emphasis added) Pet. App. at 77a. In conformity with Section 524 of the Bankruptcy Code, the Plan also provided that "any judgment at any time obtained, to

the extent that such judgment is a determination of the liability of the Debtor with respect to any debt discharged pursuant to the Plan and section 1141(d)(1) of the Bankruptcy Code, **shall be null and void**. . . ." (Emphasis added) (Pet. App. at 77a. The Plan was confirmed by Order of the Bankruptcy Court dated March 29, 1999. Pet. App. at 90a-101a.

Because Trendi had filed a proof of claim in an "unknown amount," the Plan also set forth Indu Craft's agreement to "consent to judgment being entered against it in the third party action . . . for the amount of Trendi's claim as determined by the Bankruptcy Court." Pet. App. at 88a. This was consistent with the terms of a Stipulation and Order Governing Treatment of [Trendi's] Claim In Plan of Reorganization dated March 24, 1999, pursuant to which Trendi and Indu Craft agreed to certain modifications of the Plan, and Trendi agreed to vote in favor of the Plan. Pet. App. at 102a-104a. Pursuant to Section 11.1 of the Plan, the Bankruptcy Court retained jurisdiction to "[a]llow, disallow, determine, liquidate, classify or establish the priority" of any claim, including the determination of the amount of Trendi's claim so that in the event of "any recovery" by Indu Craft in this fourth-party indemnity action, the amount of Trendi's pro rata share of distribution could be ascertained. Pet. App. at 82a.

On June 10, 1999, Indu Craft and Trendi entered into a Joint Statement of Facts regarding Trendi's claim against Indu Craft (the "Joint Statement"). Resp. App. at 28a-32a. Pursuant to the Joint Statement, Indu Craft acknowledged that it had breached its contract with Trendi regarding the purchase and sale of certain garments. Resp. App. at 28a-32a. Indu Craft also consented to $20,480,275.04 of Trendi's proposed damage claim of $21,101,348.47. Resp. App. at 34a.

By Decision and Order dated July 12, 1999, the Bankruptcy Court fixed the amount of Trendi's claim as $21,101,348.47, the full amount sought by Trendi. Resp. App. at 33a-35a. On January 18, 2000, a final judgment in that amount was entered in favor of Trendi (the "Trendi Judgment").[6] Pet. App. at 45a. On May 17, 2000, a Final Decree was entered in the Bankruptcy Action, pursuant to which Indu Craft was "discharged and released from any and all claims of creditors," and the Chapter 11 Case was closed. Pet. App. at 3a, 9a; Resp. App. at 36a-37a.

D. The First Amended Fourth-Party Complaint

On March 29, 2001 – more than 10 years after the commencement of the 1989 Action – Indu Craft served an amended fourth-party complaint, purportedly as of right, to recover in indemnity for the amount of the Trendi Judgment. In addition to its prior claims for common law indemnity, Indu Craft also asserted new claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Pet. App. at 5a, 31a. The Fourth-Party Complaint was dismissed by Final Judgment entered April 11, 2002. Pet. App. at 8a.

E. Trendi's "Second Third-Party Complaint"

On July 30, 2001 – more than one-and-half years after the entry of the Trendi Judgment and some 14 years after the events giving rise to the 1987 Action – Trendi filed what purported to be a "Second Third Party Complaint," seeking for the first time

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[6] By any standard, the Trendi Judgment was collusive in nature. As found by the District Court, the Trendi Judgment "was entered pursuant to a stipulation in a context in which Indu Craft . . . had no incentive to litigate the amount of damages." Pet. App. at 28a.

to assert direct claims against the Bank. Pet. App. at 10a. Trendi did so without leave of court, and despite the fact that it lacked standing because it was no longer a party to the pending 1989 Action. Following the granting of the Bank's motion to dismiss the fourth party action, Trendi made an application to vacate the Final Judgment, which was denied. Pet. App. at 8a-17a.

THE DECISIONS OF THE COURTS BELOW

In dismissing Indu Craft's fourth party claims for indemnification, the courts below held that because Indu Craft sought indemnity with respect to a consent judgment rendered in favor of Trendi, its affiliate, but had received a complete discharge and release in bankruptcy from all claims of all of its creditors, including Trendi, Indu Craft had not suffered, and could not suffer, any cognizable loss and its claims for indemnity were legally insufficient. Pet. App. at 24a-27a. In reaching this conclusion, the District Court stated that it was "black letter law" that "an indemnification claim does not arise until the party seeking indemnification has an out-of-pocket loss to be reimbursed," and that the law "does not permit recovery on an indemnity claim where the party seeking indemnification has not suffered an out of pocket loss." Pet. App. at 24a, 27a. Because Indu Craft had been discharged from any obligation to pay Trendi, and Trendi was barred by the Plan from seeking to enforce the Trendi Judgment, except to the extent of any recovery in this action, the lower courts held that Indu Craft's indemnity claims could not succeed as a matter of law. Pet. App. at 25a.

The courts below further held that Indu Craft's claims under RICO were also barred by both *res judicata* and the four-year RICO statute of limitations. Pet. App. at 31a-34a. Because Indu Craft's First Amended Fourth Party Complaint alleges that all of the acts complained of occurred between 1984 and 1990,

Indu Craft was on inquiry notice of such claims "at the time that the 1987 Action was tried in 1992. . . ." Pet. App. at 31a-32a. The lower courts also rejected Indu Craft's contention that its RICO claims did not arise until the time of the Trendi Judgment, holding that the "injury, if any, took place when Indu Craft was originally 'exposed to civil liability'" as a result of the filing of Trendi's third-party complaint in 1990. Pet. App. at 33a.

With respect to the claims asserted by Trendi, the courts below held that Trendi's self-styled "Second Third Party Complaint" was not an amended pleading within the meaning of Fed. R. Civ. P. 15(a), but was an independent third party complaint pursuant to Fed. R. Civ. P. 14. Pet. App. at 12a-13a. Accordingly, Trendi had no right to amend its third party complaint with respect to claims previously asserted, and which had resulted in the entry of a final judgment in favor of Trendi and against Indu Craft on January 18, 2000. In a word, it was simply too late, in 2002, for Trendi to attempt to assert direct claims against the Bank which arose in 1987, and which Trendi elected not to assert for 14 years. Pet. App. at 12a-15a.

Finally, the District Court explicitly rejected Trendi's contention that the court, in its prior opinion dismissing the fourth-party action, had held that the Trendi Judgment was "null and void," stating that "the Court never questioned the validity of the Bankruptcy Court's judgment." Pet. App. at 14a. Rather, the Court explained that it "merely held that Indu Craft's indemnification claim . . . failed to state a cause of action as a matter of New York law," and that Trendi's agreement to limit recovery on the Trendi Judgment to the proceeds, if any, of Indu Craft's fourth-party indemnity claims against the Bank "would preclude Trendi from collecting on its judgment." Pet. App. at 14a. The Court concluded by stating that

"[w]hile Trendi may well have made an ill-advised agreement, which did not take adequate account of New York law regarding indemnification, that agreement was, nevertheless, the basis upon which the judgment of the Bankruptcy Court was entered," and which "has not been set aside."[7] Pet. App. at 14a.

REASONS FOR DENYING THE PETITIONS

Petitioners have not met, and cannot meet, their heavy burden of demonstrating the existence of "compelling reasons" warranting review on a writ of certiorari. Sup. Ct. R. 10. As held by this Court in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), petitions for certiorari will only be granted "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." In the words of Chief Justice Taft in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923), certiorari jurisdiction is "not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

In support of their petitions, neither Indu Craft nor Trendi addresses, let alone challenges, the black-letter law upon which Indu Craft's common law indemnity claims were held to be legally insufficient, its RICO claims were held to be barred by *res judicata* and the four-year RICO statute of limitations, and Trendi's "Second Third Party Complaint" was held to be time-

[7] Substantially all of the arguments raised by Indu Craft and Trendi in its Petitions to this Court were made to and rejected by the Courts below. In unanimously affirming the orders of the District Court, the Court of Appeals did so by Summary Order, rather than by opinion. Nevertheless, Indu Craft and Trendi moved for rehearing and rehearing *en banc*, which was denied by Order dated July 7, 2003.

barred. Instead, Indu Craft urges that (a) the decisions below somehow violate Section 524(e) of the Bankruptcy Act, 11 U.S.C § 524(e); (b) Section 524(e) "abrogates" the common law rule requiring payment as a condition to recovery in indemnity; and (c) a "conflict" supposedly exists in the circuit courts regarding the interpretation of Section 524(e). Both Indu Craft and Trendi also claim that the decisions below constituted an impermissible "collateral attack" upon Indu Craft's reorganization plan. Finally, Trendi urges that to the extent that the courts below held that Trendi's belated "Second Third Party Complaint" did not relate back to the filing of its original third-party action, such decisions are somehow in conflict with a decision of the New York Court of Appeals.

The arguments advanced by Indu Craft and Trendi are without merit for at least the following reasons. First, (a) Section 524(e) of the Bankruptcy Code is irrelevant to any of the issues raised in the courts below; (b) there is no conflict regarding Section 524(e) and the decisions of any of the circuit courts; and (c) Section 524(e) does not abrogate or preempt the common law rules which require a loss as a condition to recovery in indemnity. Second, the determination of the courts below that Indu Craft suffered no loss, and that its claims for indemnification were legally insufficient, was not a "collateral attack" upon the Plan or any order of the Bankruptcy Court. Third, the decisions below are not in conflict with any decision of the New York Court of Appeals. Finally, and in any event, none of the arguments advanced by Indu Craft and Trendi warrants review by this Court.

I. SECTION 524(e) HAS NO APPLICATION TO THE CASE AT BAR AND THE DECISIONS BELOW DO NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY CIRCUIT COURT

Section 524(e) of the Bankruptcy Code provides that the "discharge of a debt of the debtor does not affect the liability of any other entity . . . for . . . such debt." Pet. App. at 131a. The Bank has never relied upon or otherwise claimed the benefit of Section 524(e), and has never asserted that Indu Craft's discharge in bankruptcy resulted in a discharge of Indu Craft's indemnity claims against the Bank. Rather, the Bank contends, and the courts below held, that the legal effect of Indu Craft's discharge in bankruptcy was to prevent Indu Craft from suffering any loss arising from the Trendi Judgment and that, as a result, "Indu Craft's action for indemnification cannot succeed, as a matter of law, and must be dismissed." Pet. App. at 25a.

As is clear from the legislative history of Section 524(e), the purpose of that statute was to prevent a debtor's discharge in bankruptcy from affecting the liability of a co-debtor or guarantor on the underlying debt. 4 William M. Collier *et al.*, *Collier on Bankruptcy* ¶ 524.05, n.2 (2002 ed.) *See also Terwilliger v. Terwilliger*, 206 F.3d 240, 247-48 (2d Cir. 2000). Here, the Bank is neither a "co-debtor" nor a "guarantor" of any obligation that Indu Craft may have had to Trendi, and Indu Craft's discharge in bankruptcy had no effect upon Indu Craft's burden to demonstrate the existence of a loss as a condition to asserting a valid claim for indemnity against the Bank. It is not the Bank which seeks to obtain any benefit from Section 524(e), but Indu Craft, which impermissibly seeks to use that statute in order to breathe life into a claim for indemnification that is bereft of merit.

Indu Craft's reliance upon *Green v. Welsh*, 956 F.2d 30 (2d Cir. 1992), is misplaced. *Green* and its progeny involve a narrow exception to the "fresh start" objective of the Bankruptcy Code and the discharge provisions of Section 524, which permit a creditor to proceed against a discharged debtor "solely to establish liability, as a prerequisite to recovery, permitted by state law, from an insurer or other surety." Pet. App. at 27a. This exception has nothing to do with the salient principle that "New York State law does not permit recovery on an indemnity claim where the party seeking indemnification has not suffered an out of pocket loss." Pet. App. at 27a.

For the rule in *Green* to apply, Trendi would have to sue Indu Craft in a post-discharge proceeding in order to establish Indu Craft's liability as a prerequisite to pursuing a claim against the Bank. However, the Bank in not an insurer or surety of Trendi's claims against Indu Craft, Trendi already obtained a judgment against Indu Craft and it was not Trendi, but Indu Craft, that sought to rely upon the narrow exception to Section 524(e), an exception that is intended to benefit creditors and not debtors such as Indu Craft. Simply put, Indu Craft is seeking to turn Section 524(e) on its head in order to circumvent the black letter law which prohibits any recovery in indemnity in the absence of an out-of-pocket loss.

Nor is there any "conflict" in the circuits regarding any interpretation of Section 524(e) that is applicable to the facts of this case. Indu Craft's claim of "conflict" is based upon the Third Circuit's decision in *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), a case in which the Court considered the validity of a clause in a plan of reorganization that provided for the release of third party claims, and a permanent injunction

against third party actions, against the officers and directors of the debtor. The Court held that the release and injunction provisions before it were legally unsupportable. *Id.* at 214.

In reaching this conclusion, the Court reviewed the decisions of various circuit courts which had previously considered the issue of the effect of Section 524(e) upon the validity of release and injunctive provisions regarding non-debtors in a plan of reorganization. *Id.* at 212-13. However, in none of those cases did any of the courts state that any "conflict" existed among the various decisions. Rather, and as noted by the Court in *Continental*, these decisions were fact intensive, were based upon the specific language of the particular plans under review, and did not establish a "blanket rule" regarding the validity of such release and injunctive provisions.

Regardless of the decisions reached by the courts in *Continental* and related cases, such cases have no possible bearing on the petitions for certiorari before this Court. Indu Craft's plan of reorganization contained no provision for the release of any non-debtors, the Bank has never made any claim in reliance upon Section 524(e), and the courts below did not base their decision to dismiss Indu Craft's indemnity claims upon Section 524(e). Indu Craft's attempt to use Section 524(e) to cast doubt upon the validity of the decisions below is a classic bootstrap argument that seeks to create an issue where none exists, and certainly does not demonstrate the existence of any "conflict" or compelling issue sufficient to warrant review by this Court.

II. SECTION 524(e) DOES NOT PREEMPT STATE LAW AS TO THE REQUIREMENTS FOR COMMON LAW INDEMNIFICATION

In support of its petition for a writ of certiorari, Indu Craft urges for the first time that the common law requirements for a claim of indemnification have been preempted by Section 524(e) of the Bankruptcy Code. (Indu Craft Br. at 17-18) However, Indu Craft never raised this argument in any of the courts below, and neither the District Court nor the Court of Appeals ever passed on this issue. Indu Craft is precluded from raising this issue before this Court.

It is axiomatic that the Supreme Court does not ordinarily decide questions that have not been raised or resolved by the lower courts. *Lawn v. United States*, 355 U.S. 339, 362-263, n.16 (1958); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). As stated by the Court in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992), this is one of the principles that "help to maintain the integrity of the process of certiorari." Accordingly, Indu Craft's claim of preemption should not be considered as part of its petition for a writ of certiorari.[8]

Separate and apart from the foregoing, the contention that Section 524(e) has abrogated or preempted the common law rule that requires payment as a condition to a claim for indemnification is meritless. As acknowledged by Indu Craft, Section 524(e) contains no language of preemption, and there is nothing in Section 524(e) that would remotely indicate any

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[8] Indu Craft's contention that the Bank lacks "standing" to raise any argument based upon the legal effect of Indu Craft's discharge in bankruptcy is another argument that was never raised below and should not be considered by the Court. (Indu Craft Br. at 24)

intent on the part of Congress to preempt any aspect of the state law of indemnification. Simply stated, neither the fresh start objective of the Bankruptcy Code, nor the provisions of Section 524(e), have any possible bearing on the settled principal that a party seeking indemnity cannot recover in the absence of proof that it has suffered a loss. Pet. App. at 24a-27a.

Consideration of whether a federal law pre-empts state law, "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" of pre-emption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). In the absence of express preemption, there can by no preemption of state law unless "that [state] law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" [citations omitted] *Id.*

Any contention that Section 524(e) preempts the payment rule of state indemnity law is not supported by the language, structure, or purpose of the Bankruptcy Code. The common law payment rule as applied to indemnity claims has nothing to do with the limited objective of Section 524(e) of preserving the liability of non-debtors who are jointly liable for the obligation of a debtor that is discharged in bankruptcy. Conversely, there is nothing in either the statutory language of

Section 524(e), or its legislative history, that would evidence any possible legislative concern regarding any common law claims of indemnity. *See, e.g., Brown v. Northeast Nuclear Energy Co.*, 48 F. Supp.2d 116, 120 (D. Conn. 1999) (no preemption of common law claims for breach of contract and tort, by field of federal nuclear safety legislation, where state law claims were "not motivated by an objective of regulating nuclear safety.")

Finally, the requirement of payment as a condition to a claim for indemnification does not create any conflict with the purpose of Section 524(e). It is not the fact of Indu Craft's discharge in bankruptcy, but the legal consequences of that discharge on Indu Craft's claims for indemnification that rendered such claims legally insufficient. That result has nothing whatsoever to do with Section 524(e).

III. THE DECISIONS OF THE COURTS BELOW DO NOT CONSTITUTE A "COLLATERAL ATTACK" UPON ANY ORDER OF THE BANKRUPTCY COURT

Contrary to the assertions of Indu Craft and Trendi, the determination of the courts below that Indu Craft's discharge and release in bankruptcy constituted a legal bar to Indu Craft's claims for indemnification is not a "collateral attack" upon any order of the bankruptcy court, let alone a "nullification" of Indu Craft's reorganization Plan. (Indu Craft Br. at 22-23, Trendi Br. at 11-14) At no time did the Bank ever challenge or seek to set aside the validity of any aspect of the Plan, and the decisions below contain no finding that any aspect of the Plan was invalid. Indeed, the same argument was rejected by the courts below, with the District Court explaining that in dismissing Indu Craft's fourth-party action, the Court "never

questioned the validity of the Bankruptcy Court's judgment," but "merely held that Indu Craft's indemnification claim . . . failed to state a cause of action as a matter of New York law." Pet. App. at 14a.

This Court's decision in *Celotex Corporation v. Edwards*, 514 U.S. 300 (1995), underscores the fact that the Bank's defense to the indemnification claims asserted by Indu Craft did not constitute a "collateral attack" upon any order of the Bankruptcy Court. In *Celotex*, this Court reversed a decision of the United States Court of Appeals for the Fifth Circuit, which held that respondents were entitled to execute upon a supersedeas bond posted to secure a final judgment, despite the fact that the bankruptcy court had issued an injunction prohibiting any execution on the bond without further court order. Granting certiorari to resolve a conflict between the circuit courts, this Court held that by obtaining an injunction in the Texas district court, respondents had engaged in an impermissible collateral attack upon the injunction issued by the bankruptcy court, from which no appeal had been taken. 514 U.S. at 313.

Here, it is Indu Craft and Trendi which seek to "collaterally attack" their own plan of reorganization by engaging in inventive interpretations which fly in the face of the plain language of the Plan. Thus, Indu Craft continues to argue that Trendi's claim against Indu Craft was never discharged, despite the express language of the Section 9.1 of the Plan that upon the effective date thereof, "the Debtor **shall be discharged** . . . from all Claims against and Interests in the Debtor that arose prior to the Effective Date . . . ," and Section 5.2 of the Plan, which provides that "Allowed Claims in Classes 4 and 5 are impaired and shall receive the following treatment under the Plan **in full settlement, release and discharge thereof**." (Emphasis added) Pet. App. at 77a, 64a. Similarly, Indu Craft's assertion that the

holdings of the courts below somehow impair the "feasibility" of the Plan is contrary to law, and is equally belied by its admission in its Disclosure Statement that the Plan was "feasible" and in the best interests of all of its creditors.[9] Resp. App. at 18a.

Indu Craft's contention also rests upon a fundamental misconception regarding the treatment of a claim in bankruptcy. Pursuant to § 1141(d)(1)(A) of the Bankruptcy Code, the confirmation of a debtor's Chapter 11 plan of reorganization "discharges the debtor from any debt that arose before the date of such confirmation. . . ." *In re Chateaugay Corp.*, 115 B.R. 760, 773 (Bankr. S.D.N.Y. 1990). Consistent with the foregoing, the effect of confirmation of a plan of reorganization is to extinguish all allowed or allowable claims, which are exchanged for the right to participate in and receive any benefits of that plan. *In re Friedberg*, 192 B.R. 338, 341 (Bankr. S.D.N.Y. 1996). As explained by the court in *In re Cole*, 189 B.R. 40, 45 (Bankr. S.D.N.Y. 1996), "the creditor's underlying claim is extinguished by confirmation of the plan with the debtor's obligation to comply with the terms of the confirmed plan being substituted for the underlying claim."

By voting in favor of the Plan, Trendi agreed to limit any recovery on the Trendi Judgment to its pro rata share of the

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[9] A finding that a plan of reorganization is feasible is not a guarantee of success. *In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986). Rather, the "key element of feasibility is whether there exists the reasonable probability that the provisions of the Plan can be performed." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992); *see also In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985) (quoting *In re Bergman*, 585 F.2d 1171, 1179 (2d Cir. 1978)). As explained by the Court in *In re Drexel Burnham Lambert Group*, "speculative prospects of failure cannot defeat feasibility . . . since a guarantee of the future is not required." 138 B.R. at 762.

proceeds, if any, of any judgment obtained by Indu Craft on its fourth-party claims for indemnification against the Bank. Pet. App. at 14a, 102a-104a. However, because Trendi's claim against Indu Craft was settled, released and discharged, Indu Craft has not suffered, and cannot possibly suffer, any loss for which a claim for indemnity would lie. Having drafted the Plan and the discharge and release provisions contained therein, it is simply too late for Indu Craft, with the aide of Trendi, its sister company, now to attempt to rewrite those provisions in a manner more to its liking.[10]

IV. THE DECISIONS OF THE COURTS BELOW DO NOT CONFLICT WITH ANY DECISION OF THE NEW YORK COURT OF APPEALS

Seeking to create a conflict where none exists, Trendi urges that the decisions below dismissing its "Second Third Party Complaint" somehow conflict with the decision of the New York Court of Appeals in *Duffy v. Horton Memorial Hospital*, 66 N.Y.2d 473, 497 N.Y.S.2d 890 (1985). In *Duffy*, the New York Court of Appeals held that an amended complaint against a third-party defendant, with actual notice of plaintiff's potential claims, would relate back to the time of the filing of the original complaint. As stated by the Court, where "a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, . . . permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations." 66 N.Y.2d at 477, 497 N.Y.S.2d at 893.

[10] Pursuant to Section 1144 of the Bankruptcy Code, a party seeking to revoke an order of confirmation must do so within "180 days after the date of the entry of the order of confirmation." Here, the Plan was confirmed by Order of the Bankruptcy Court dated March 29, 1999. Pet. App. at 90a-101a.

The facts in *Duffy* are not remotely similar to facts of this case and serve only to underscore the correctness of the decisions below dismissing Trendi's belated pleading in its entirety. Unlike the plaintiff in *Duffy*, Trendi never sought to amend its pleading, but simply asserted direct claims against the Bank, purportedly as a matter of right, long after its third-party claims had been fully adjudicated and merged into a final judgment, and long after the expiration of all applicable statutes of limitation. Unlike the third-party defendant in *Duffy*, the Bank had no notice that it would be subjected to claims by Trendi that arose some **15 years** earlier, and which Trendi deliberately failed to assert despite having had every opportunity to do so.

The decision in *Duffy* is not only fact-intensive, but involves facts that are far different from those presented in the instant case. To the extent that petitioners seek to alter or challenge factual determinations reached by the courts below, such matters are not properly within the scope of review by this Court.[11] In the absence of extraordinary circumstances, it is the "settled practice" of this Court to accept "factual determinations in which the district court and the court of appeals have concurred." *Branti v. Finkel*, 445 U.S. 507, 512 (1980); *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 501 (1951).

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[11] Without the benefit of citation to the record, Trendi asserts that the Bank "had 'actual notice' of Trendi's claims when [the Bank] was impleaded in 1990." (Trendi Br. at 24) The record facts are otherwise. Until July 30, 2001, when Trendi filed its "Second Third Party Complaint" seeking for the first time to assert direct claims against the Bank, the only claims ever asserted by Trendi were the third-party claims that it asserted against its sister company, Indu Craft. Pet. App. at 2a-5a, 10a. Trendi made the same argument in the courts below, and although such courts did not specifically rule on Trendi's false claim of "notice," such claim was implicitly rejected by the refusal to allow Trendi's self-styled pleading to relate back to May, 1990, the time of its original third-party claims against Indu Craft.

Finally, the standard of review of a determination not to permit a new or amended pleading to relate back to the date of the original pleading is an abuse of discretion. *Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir. 1998); *See also Tho Dinh Tran v. The Alphonse Hotel Corp.*, 281 F.3d 23, 26-27 (2d Cir. 2002). Whether or not the decisions below regarding the relation back of Trendi's "Second Third Party Complaint" constituted an abuse of discretion is not a matter that is subject to review by this Court. *Cheang-Kee v. U.S.*, 70 U.S. 320, 326 (1865). Accordingly, no further review of the determinations of the courts below dismissing Trendi's belated and untimely pleading is warranted.

V. PETITIONERS' REMAINING ARGUMENTS ARE WITHOUT MERIT

Virtually every argument advanced by petitioners rests upon a false or misleading premise, or is otherwise based upon a misinterpretation of facts that is beyond the proper scope of review by this Court. For example, petitioners' entire argument regarding Section 524(e) of the Bankruptcy Code is based upon the erroneous notion that the decisions below "effectively granted a non-debtor discharge" to the Bank in violation of Section 524(e). (Indu Craft Br. at 8) Petitioners' mischaracterization of the decisions of the courts below falls far short of the heavy burden they are required to meet in order to demonstrate the existence of a compelling reason sufficient to warrant review by this Court.

Similarly, Trendi's contention that the decisions below create a compelling issue regarding the statute of limitations applicable to its "Second Third Party Complaint" is plainly erroneous. Far from creating "three different statutes of limitation for the same claim," the decisions below applied

settled and incontrovertible legal principles to dismiss a pleading which Trendi had no standing to file, and which was plainly time-barred under the most generous of limitation periods. (Trendi Br. at 25) Trendi's misunderstanding of these principles provides no basis for review by this Court.[12]

As stated by the District Court, pursuant to Fed. R. Civ. P. 14(a), Trendi was "fully advised" of Indu Craft's claims against the Bank and, as a defendant and third-party plaintiff in the 1989 Action, could have filed a direct claim against the Bank at any time between the filing by Indu Craft of its fourth party action on June 21, 1990 and the entry of Final Judgment by the Bankruptcy Court on January 18, 2000. Pet. App. at 14a-15a. However, Trendi was required to do so "before the statute of limitations has run." Pet. App. at 12a. For reasons that "remain[] unexplained," Trendi, simply failed to do so. Pet. App. at 15a.

Trendi's reliance upon the cases cited at page 26 of its brief is equally misplaced. Unlike the facts found by the courts below, these cases involved situations in which third-party defendants

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[12] By its terms, Rule 14 only applies to parties to a pending action, and "only defending parties may implead." 3 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 14.03[2] (3d ed. 2003) Thus, only a "defending party" may commence a third-party action, only a "third-party defendant" may assert claims against the plaintiff or any person who is not a party "who is or may be liable to the third-party defendant" for the claims asserted against him, and only a "plaintiff" may assert claims directly against the third-party defendant. Fed R. Civ. P. 14(a). Once the third-party action was terminated by the entry of judgment in favor of Trendi, Trendi was no longer a "party," let alone a "defending party," to the third-party action, and lacked standing to assert any third-party claims against the Bank. *Retcal, Inc. v. Insular Lumber Co. (Phil.), Inc.*, 379 F. Supp. 62, 64 (C.D. Cal. 1973) (persons who were neither defendants, defending parties, nor claimants were not authorized to file third-party action under Rule 14).

had actual notice that the plaintiffs were proceeding directly against them, and actually defended against plaintiffs' claims without objection, despite the fact that no formal claim had ever been asserted by plaintiffs directly against such third-party defendants.[13] Again, Trendi's reliance upon these cases rests upon its unilateral and unsupported assertion that the Bank was "effectively on notice" of Trendi's claims, an assertion that was made and implicitly rejected by the courts below.

Finally, and without the benefit of any authority, Indu Craft urges that this Court should exercise its "supervisory powers" in order to give effect to the Trendi Judgment, despite the plain language of the Plan which discharges Indu Craft from any liability on Trendi's underlying claim except to the limited extent provided for in the Modified Plan. (Indu Craft Br. at 25-27) In making this argument, Indu Craft erroneously asserts that the decisions below were fundamentally inconsistent in that they purportedly held that the Trendi Judgment, although not void, was not required to be paid by Indu Craft. (Indu Craft Br. at 25) Once again, Indu Craft's baseless attack upon the decisions of the courts below provides no conceivable basis for review by this Court.

Contrary to petitioners' rhetorical assertions, the decisions below are neither inconsistent, contradictory, conflicting, illogical, unfair or, in the words of Trendi, "schizophrenic." (Indu Craft Br. at 25-26, Trendi Br. at 22) Rather, such decisions rest upon the fundamental and irrefutable rule that a party may not recover in indemnity in the absence of a loss. As held by the courts below, and as a result of Indu Craft's discharge in bankruptcy, Indu Craft had not suffered, and could not suffer, any loss for which a claim for indemnity would lie.

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[13] *See Project Hope v. M/V IBN SINA*, 250 F.3d 67 (2d Cir. 2001), and *Wasik v. Borg*, 423 F.2d 44 (2d Cir. 1970).

Simply put, the indemnity claims asserted by Indu Craft in its fourth-party action, and the direct claims belatedly asserted by Trendi in its "Second Third Party Complaint," are a sham. If Trendi and Indu Craft were truly at arms-length, it is inconceivable that Indu Craft, having received a full discharge and release in bankruptcy, would invest the time, effort and expense to pursue a claim for indemnity with respect to a collusive judgment which it cannot pay, has no obligation to pay, and as to which it has not suffered, and will never suffer, any loss. The decisions of the courts below were correct, petitioners have failed to demonstrate any basis for review by this Court, and the time has come to bring this Dickensian litigation to an end.

CONCLUSION

For each of the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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